IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

Arbitration Petition No. 186 of 2007

DLF Power Limited ..Petitioner

vs.

1. Mangalore Refinery and Petrochemicals Ltd.and another ..Respondents

Mr.Janak Dwarkadas, Sr.Counsel i/b Ms.Usha Dhahanukar, Mr.Dinesh Chamboowala and Mr.Nishant Menon i/b Mr.Anil Agarwal for the petitioner.

Mr.K.Setalwad i/b M/s Mulla and Mulla for respondent no.1.

CORAM: S.C.DHARMADHIKARI J.
27th July, 2007

P.C.

1. When the matter was called out, none was appearing for the petitioner and, therefore, the petition came to be dismissed for non prosecution. Later on at the joint request of Mr.Dwarkadas and Mr.Setalwad the order dismissing the petition is recalled and the petition is taken up for hearing and final disposal forthwith by consent.

2. Heard Mr.Dwarkadas, Sr.Counsel appearing for the petitioner and Mr.Setalwad, learned Counsel appearing for respondent no.1.

3. The arbitration petition under sec.9 seeks an injunction against the respondents from in any manner encashing or making payment under the Bank Guarantee No. 43/2 dated 3rd January, 2001 which has been extended upto 31st May, 2007, a copy of which is at Exh.L.

4. Mr.Dwarkadas, learned Senior Counsel, after inviting my attention to the contract between the parties so also the relevant guarantee, submits that on the own showing of respondent no.1 and as per the statement of account, it has deducted certain sums including the liquidated damages. He submits that the Bank Guarantee was in the sum of Rs.4,68,58,621/- whereas the balance recoverable even as per the statement of respondent no.1, the correctness of which is disputed, is Rs.70.28 lacs.

5. Mr.Dwarkadas, in the above circumstances, says that considering that the Bank Guarantee is of 2001, the extended period for completion of the contract having long passed, invoking the said guarantee in April, 2007 is nothing but a fraud and in any event special equities would arise because the subject guarantee being in the sum as aforesaid and balance being only Rs.70.28 lacs, this is a fit case where this Court should step in and in the light of the settled principles grant injunction as prayed. The injunction, if refused would result in irretreivable injustice to the petitioners.

6. Mr.Setalwad on the other hand states that this is a Bank Guarantee which is an independent matter and no dispute under the subject contract would govern encashment thereof. The bank is obliged to pay the sums in terms of the guarantee, moment the demand is made, which also is made in terms thereof.

7. After having heard both sides and noticing that respondent no.1 is to encash the bank guarantee only to the extent of Rs.70.28 lacs, which according to it, is the balance due and payable, I am of the view that larger issues and controversy need not be gone into. The principles upon which the Bank Guarantee can be invoked and whether the Bank Guarantee which is of the year 2001, be kept alive, till the quantum of liquidated damages is determined or not or the determination thereof by respondent no.1 is valid and proper, are all matters which must be decided in the pending proceedings before the Arbitral Tribunal.

8. Considering that in para 49 of the reply affidavit the extent of the amount due and payable is admitted at Rs.70.28 lacs and the Bank Guarantee being of Rs.4.68 crores the interest of justice would be subserved if the following order is passed:-

a) Upon the petitioner depositing in this Court a sum of Rs.70.28 lacs within a period of six weeks from today, respondent no.1 shall not encash the subject bank guarantee and it would stand released and discharged.

b) Needless to say that in default, it would be open for respondent no.1 to encash the Bank guarantee subject to the outcome of the proceedings before the Arbitral Tribunal. Registry is directed to accept the said sum of Rs.70.28 lacs if deposited within the above period and thereupon shall invest it in fixed deposit with a Nationalised Bank initially for a period of 36 months and lateron subject to the directions and order of this Court/Arbitral Tribunal. Needless to state that the Bank Guarantee would be kept alive for a period of 6 weeks from today.

c) The order does not in any manner conclude the issues and all rights and contentions of parties are kept open. This order is without prejudice to the same. The Arbitral Tribunal to decide the issues arising out of the rival claims uninfluenced by any observations and upon their own merits and in accordance with law.

(S.C.DHARMADHIKARI J.)